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NO.

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1984

Berman & Sons, Inc., William J. Allen, Martin S. Berman, and Lila Gross,

Appellants

v.

Lana J. Scofield and A. Larry Berren, on behalf of themselves and all those similarly situated,

Appellees

ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPENDIX

JAMES B. FOX, Esquire
Counsel of Record
MITCHEL S. ROSS, Esquire
Bernkopf, Goodman & Baseman
99 High Street, Suite 2050
Boston, MA 02110
Tel: (617) 542-7070

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LANA J. SCOFIELD & others[1] *vs.* BERMAN & SONS, INC. & others.[2]

Suffolk. April 6, 1984. — October 3, 1984.

Present: HENNESSEY, C.J., WILKINS, LIACOS, LYNCH, & O'CONNOR, JJ.

[1] A. Larry Berren and other tenants who were members of the plaintiff class.

[2] Martin S. Berman, Lila Gross, and William J. Allen.

CIVIL ACTION commenced in the Housing Court of the City of Boston on May 12, 1977.

The case was heard by *Patrick J. King*, J.

After review was sought in the Appeals Court, the Supreme Judicial Court ordered direct appellate review on its own initiative.

Harvey S. Shapiro for the plaintiffs.

James B. Fox for the defendants.

LIACOS, J. The defendants appeal from a judgment entered in the Housing Court of the City of Boston declaring that the defendants violated c. 15, § 9 (*a*), of the Boston Ordinances of 1975 (c. 15), and Boston Rent Board Regulation 11, § 12(A) (Regulation 11), by unlawfully increasing the rent charged to the plaintiffs, tenants in rent-controlled apartments. The defendants also claim error in the judge's award of treble damages, costs, and attorneys' fees, pursuant to c. 15, § 9 (*a*), to those members of the plaintiff class who had paid the unlawful increase. The plaintiff class, as cross appellants, appeal from that aspect of the judgment which denied their claim for multiple damages under G. L. c. 93A, § 9 (1). The plaintiff Scofield appeals from the denial of her individual claims for damages resulting from the defendants' refusal to allow her to remain as a tenant at will following the expiration of her lease. See G. L. c. 186, § 18. The appeals were transferred here on our own motion. We affirm the judgment as to the class action, and reverse as to the individual Scofield claim.[1]

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[1]The plaintiff class and Scofield, individually, seek authorization from us to apply to the trial court for additional attorneys' fees in connection with the appeals in this matter. Since we affirm the judge's rulings under c. 15, we will allow the plaintiffs to so apply for additional fees. See *Linthicum* v. *Archambault*, 379 Mass. 381, 388-389 (1979).

1. *Prior Proceedings.*

Scofield instituted this class action in May, 1977, seeking injunctive and declaratory relief, as well as monetary damages.[4] In June, 1977, the Housing Court judge certified the class[5] and enjoined the defendants from demanding, collecting, or pursuing any legal remedies against the plaintiffs to collect an increase in their rent. Subsequently, the judge found the defendants Berman & Sons, Inc. (Berman & Sons), and William J. Allen in contempt of court for violating the injunction.

In January, 1979, following extensive discovery, the plaintiffs moved for partial summary judgment on their class claims. See Mass. R. Civ. P. 56 (a), 365 Mass. 824 (1974). Following hearings on the motion, the judge granted summary judgment and damages to the plaintiff class.[6] A trial on Scofield's individual claims then was held before the judge. In November, 1981, the judge denied Scofield's individual claims and ordered the entry of final judgment in accordance with his earlier rulings on the summary judgment motion. At the parties' request, the

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[4] The first complaint alleged only a violation of c. 15 and § 12 of the rent board's regulation. The first amended complaint included a claim by the class for damages under G. L. c. 93A, based on the defendants' unlawful rent increase. Scofield also sought individual relief against the defendants, based on their alleged unlawful "reprisals" against her by refusing to allow her to occupy her apartment as a tenant at will. The amended complaint also added William J. Allen, the landlord's property manager, as a party defendant.

The plaintiffs filed a second amended complaint, which added Martin S. Berman and Lila Gross as party defendants. Berman and Gross are general partners of Berman Central Realty, a Massachusetts limited partnership which owned the buildings managed by Berman & Sons, Inc., and wherein the plaintiffs rented their apartments.

[5] The class, as certified, consisted of "[A]ll persons who have been residing as tenants under a written lease with the defendant since November 24, 1976 at [properties owned by the defendants] Boston, Massachusetts, whose premises are subject to Rent Control, and whose tenancies are governed by a form of apartment lease utilizing a clause with language identical or substantially the same as that contained in Paragraph no. 33 of the lease executed by the named plaintiffs."

[6] The judge subsequently allowed Scofield's motion to supplement her individual claim for damages under G. L. c. 186, § 18, with a claim under G. L. c. 93A. A third amended complaint subsequently was filed.

judge made supplemental findings of fact and entered an amended judgment from which both parties appealed.

2. *Class Action Claims.*

A. *Facts.* The defendant Berman & Son is the managing agent of apartment buildings involved in these actions. The defendant William J. Allen is the property manager for Berman & Sons. The defendants Martin S. Berman and Lila Gross are general partners of Berman Central Realty, a Massachusetts limited partnership and owner of the properties. The apartments occupied by the plaintiffs were, at all relevant times, subject to c. 15 of the ordinances.

In 1975, the plaintiffs Scofield and Berren signed form leases with the defendants for a term of one year and from year to year thereafter unless terminated by either party as provided for by the lease. The form lease contained the following clause (hereinafter clause 33), which provided: "[I]f during the term of this lease or any extension or renewal thereof, rent control laws or laws regulating rents remain in effect or become applicable to the demised premises, and the Lessor is authorized or permitted to increase the maximum rent for the demised premises, then the rent to be paid by the lessee hereunder, commencing with the effective date of such authorization or permission shall be the maximum rental so authorized or permitted."

On November 24, 1976, the Boston rent board (Rent Board) authorized a general rent adjustment for housing subject to rent control in Boston. Regulation 11, § 12A, of the Rent Board, promulgated on December 16, 1976, to implement the general adjustment, provided in relevant part as follows: "Subject to the provisions of this Regulation the new maximum rent as established by this regulation may not be charged until the expiration of any lease or tenancy existing on the effective date of this Regulation, or unless the tenant is given the option of terminating the tenancy under a provision of the lease agreement."

The office manager of Berman & Sons called the Rent Board to inquire about the forthcoming adjustment. She was advised that the adjustment would take effect on January 1, 1977, and that only leases containing a "rent control clause" could im-

mediately implement the increase. Otherwise, a landlord could not implement the adjustment until the termination of the existing leases.

The defendants decided that clause 33 of their lease form was a valid rent control clause, and, accordingly, sent notices to their tenants in January and February, 1977, advising them that the authorized rent increase took effect as of January 1, 1977.[7] Several tenants in the apartments in issue refused to pay the increase, and the Rent Board advised certain tenants that the increase was unlawful. Scofield and another tenant informed Berman & Sons that an employee at the Rent Board had told them that clause 33 was invalid. A Rent Board compliance investigator also informed Berman & Sons by letter that their rent control clause was invalid and that, if they had any questions, they should call him. Subsequently, the defendants commenced small claims actions against at least twenty tenants who had not paid the increase. The defendants also sent them notices to quit for nonpayment of rent. Some of the tenants agreed to pay the increase after being sued.[8]

B. *Regulation 11*. The judge found that Regulation 11 was validly promulgated pursuant to the Rent Board's enabling legislation, which allowed the board to make regulations effecting general rent adjustments and to condition such adjustments so as to "remove hardships or to correct other inequities." See c. 15, §§ 2 (*a*), 5 (*a*), 6 (*b*). Moreover, the judge concluded that

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[7] The adjustment amounted to an 11% increase in the rent charged to the plaintiffs by Berman & Sons. Scofield was notified that her monthly rent had been increased from $217 a month to $240 a month.

[8] In May, 1977, the plaintiffs' counsel wrote a letter to Berman & Sons pursuant to the Consumer Protection Act, G. L. c. 93A, § 9 (3), making demand upon the lessor for unlawfully imposing the increased rent upon Scofield and the other tenants before the expiration of their leases and without an opportunity to "opt-out" of their leases. Counsel demanded that the unlawful adjustment be rescinded and a reasonable offer of settlement tendered or he would commence a class action against the defendants under G. L. c. 93A. William Allen responded by letter to the demand letter stating that Berman & Sons desired and intended "to correct any incorrectly assessed rent increases," although they denied having engaged in fraudulent or deceptive practices. No further meetings nor settlement negotiations were held by the parties.

Regulation 11 provided an equitable solution to the problem of tenants who might not be able to afford the 11% increase, by delaying implementation of the adjustment until the expiration of the lease unless it contained an opt-out provision.

The defendants maintain that the judge erred in concluding that Regulation 11 was validly promulgated. The defendants argue that c. 15 enables the Rent Board only to establish a general adjustment of the maximum rent. It is a well-settled principle that a regulation is to be judged by the same standard as a statute, ordinance, or by-law. See *Druzik* v. *Board of Health of Haverhill*, 324 Mass. 129, 138 (1949). "All rational presumptions are made in favor of the validity of [the] enactment." *Id.* Furthermore, an agency has much flexibility in interpreting a statute which it is charged with enforcing. *Grocery Mfrs. of America, Inc.*, v. *Department of Pub. Health*, 379 Mass. 70, 75 (1979). When the agency is vested with broad authority, as is the Rent Board, to promulgate regulations which fulfil the purposes of its enabling legislation, such a regulation is not considered invalid if it relates reasonably to the objectives of that enabling legislation. See *Consolidated Cigar Corp.* v. *Department of Pub. Health*, 372 Mass. 844, 855 (1977). *Thorpe* v. *Housing Auth. of Durham*, 393 U.S. 268, 280-281 (1969).

In St. 1969, c. 797, as amended by St. 1970, c. 863, § 1, the Legislature declared "that a serious public emergency [exists] in the city of Boston . . . which emergency continues to be marked by a substantial shortage of rental housing accommodations; that, unless residential rents continue to be regulated and controlled and unless evictions of tenants are regulated and controlled, such emergency . . . will produce serious threats to the public health, safety and general welfare of the citizens of [Boston]." The statute further provided that to improve such an emergency shortage of rental housing, the city may, by ordinance, control the rents of certain housing. See *id.* at c. 863, § 2. The ordinance, which was enacted by the city council as c. 15, provided in § 5 (a) that the Rent Board "shall, by order or regulation . . . make such individual or general adjustments . . . of the maximum rent . . . as may

be necessary to remove hardships or to correct other inequities." Chapter 15 further provided that the Rent Board may promulgate regulations to establish a general adjustment of maximum rent "subject to such conditions . . . as the board shall determine." *Id.* at § 6 (*b*).

Based on the foregoing provisions we conclude that the judge correctly held that Regulation 11 relates reasonably to the objectives of the statute and the ordinance. Cf. *McGrath* v. *Mishara*, 386 Mass. 74, 76, 81-82 (1982). Implicit in the Rent Board's power to establish a general rent adjustment is the authority to set certain conditions on when and how rent increases are to take effect. Cf. *Flynn* v. *Cambridge*, 383 Mass. 152, 158 (1981) (grant of express power to municipality carries with it all unexpressed, incidental powers necessary to effectuate express authority); 3 C. Sands, Sutherland Statutory Construction § 64.02 (4th ed. 1974). By requiring that the adjustment not take effect until the end of the current lease unless the tenant has the option to terminate the lease agreement, Regulation 11 reasonably accommodated the competing equities of both landlord and tenant.

The judge also denied the defendants' claim that Regulation 11 violated the contract clause of the United States Constitution by retroactively applying to deprive them of rights under a contract that was executed before the effective date of the regulation. See art. 1, § 10, cl. 1, of the United States Constitution.[9] The defendants claim this to be error and argue also that the judge should have decided that a retroactive application of the regulation would constitute a deprivation of property without due process of law.

By the terms of the defendants' lease agreement, the lessor was not entitled to a rent increase unless "authorized or permitted" to adjust the rent under the "rent control laws . . . regulating rents . . . [in] the demised premises." This provision clearly provides that any adjustment would be subject to the Rent Board's approval. It is anomalous for the defendant now to

[9]Article 1, § 10, cl. 1, of the United States Constitution provides, in part: "No state shall . . . pass any . . . law impairing the obligation of contracts."

argue that Regulation 11 deprived them of rights under their lease agreement. In any event, Regulation 11 did not deprive the defendants of their right to receive a rent increase. Under Regulation 11, the defendants could have obtained the increase immediately if their lease had contained the opt-out provision, otherwise the regulation merely deferred the implementation of the increase until current leases expired.[10] Previously, we implicitly approved forestalling the immediate implementation of rent increases, based on a decision by the Boston rent control administration which used language almost identical to the wording of Regulation 11. See *McGrath* v. *Mishara*, *supra* at 76, 81, 83.

C. *Multiple damages*. The judge ruled that, given the absence of an opt-out provision, clause 33 of the lease did not satisfy Regulation 11. Thus, he ruled the defendants were precluded from charging the rent adjustment until the expiration of the leases. By demanding and, in some cases, receiving the unlawful increases from the plaintiffs prior to this time, the defendants violated c. 15 of the ordinance. See c. 15, § 9 (*a*).[11] The judge found, as matter of law, that, based on the undisputed facts, the defendants failed to take "practicable precautions" against the occurrence of a § 9 (*a*) violation. Thus, the judge

[10] The provision in clause 33, which states that the defendants may obtain a rent increase "commencing [on] the effective date of the [Rent Board's] authorization," seems to us in no way inconsistent with the provision of Regulation 11, § 12A, which specifies the time and circumstances under which a rent increase may be authorized.

[11] Section 9 (*a*) of c. 15 provides: "Section 9. *Civil Remedies*. (a) Any person who demands, accepts, receives, or retains any payment of rent in excess of the maximum lawful rent, in violation of the provisions of this ordinance, or any rule, regulation, or order hereunder promulgated, shall be liable . . . to the person from whom such payment is demanded, accepted, received, or retained, . . . for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of one hundred dollars, or not more than three times the amount by which the payment or payments demanded, accepted, received, or retained exceed the maximum rent which could be lawfully demanded, accepted, received, or retained, whichever is the greater; provided that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation, the amount of such liquidated damages shall be the amount of the overcharge or overcharges."

ruled that the defendants were liable to each member of the plaintiff class who had paid the increase, the greater of $100, or three times the amount of illegal rent received, plus reasonable attorneys' fees.

The defendants contend that the judge erred in granting the plaintiffs' motion for partial summary judgment pursuant to c. 15, § 9 (*a*). Under § 9 (*a*), the defendants argue, a material issue of fact existed concerning whether the defendants acted wilfully or failed to take practicable precautions against the occurrence of a violation of the ordinance.[12]

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), 365 Mass. 824 (1974). Once the moving party sustains the burden of proving the absence of a material issue of fact, the opposing party may not rely on his pleadings or general denials, but must "set forth specific facts" to show there is a genuine, triable issue. See *Community Nat'l Bank* v. *Dawes*, 369 Mass. 550, 554 (1976). Mass. R. Civ. P. 56 (e). We draw inferences from the facts contained in the materials which accompany a motion for summary judgment in the light most favorable to the party opposing the motion. However, neither "vague allegations and conclusory statements, nor assertions of inferences not based on underlying facts will suffice" to sustain the claims in favor of, or against, granting the motion. See *First Nat'l Bank* v. *Slade*, 379 Mass. 243, 246 (1979).

Multiple damages and attorneys' fees and costs can be awarded under c. 15, § 9 (*a*), if the defendants fail to show that

[12] We need not deal with the defendants' claim that the summary judgment should not have been entered under G. L. c. 93A, § 9, since there was evidence of the defendants' good faith attempts to settle the dispute and of the plaintiffs' refusal to accept the overcharges as a settlement. The summary judgment order of the judge in so far as it awarded damages under G. L. c. 93A was superseded by his subsequent, amended judgment relieving the defendants from paying duplicative damages under both G. L. c. 93A and c. 15

their violation of the ordinance was "neither willful *nor the result of failure to take practicable precautions against the occurrence of* the violation" (emphasis supplied). A violation of the ordinance occurs when a landlord "demands, accepts, *receives*, or *retains* . . . rent in excess of the maximum lawful rent" (emphasis supplied). *Id.*

The essential factual allegations presented by the plaintiffs' complaints, affidavits, and other materials supporting their motion were not refuted. The record shows that the defendants were placed on notice that their rent control clause was invalid. However, they refused to investigate the correctness of this claim. The defendants not only refused to do anything at this juncture to determine the legality of their increase; they engaged in further violations of c. 15 by continuing to demand that they receive the increase, and by retaining the overcharges already received. Thus, even if we assume that the defendants' averments showed the existence of a triable, factual issue concerning their failure to take practicable precautions in initially implementing the rent increase, the defendants have not demonstrated an issue of material fact with respect to their continuing violations of c. 15 by demanding, receiving, and retaining the unlawful increases after being placed on notice that this conduct was illegal.

We construe "practicable precautions" to mean those precautions which a reasonable person in the defendants' position would take to guard against violating c. 15. A genuine factual issue must be demonstrated by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank* v. *Cities Serv. Co.*, 391 U.S. 252, 288-289 (1968). Accord, *Hahn* v. *Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). No such evidence was presented here. We thus conclude that the judge acted correctly in granting the plaintiffs' motion for partial summary judgment. Cf. *Nunez* v. *Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978) (judge warranted in deciding on summary judgment motion that party acted reasonably or unreasonably, even if conclusion involves mixed question of fact and law);

Hahn v. *Sargent, supra* at 468 (party against whom summary judgment sought not entitled to trial merely because state of mind is essential element in cause of action; party must still show ability to produce evidence sufficient to reach jury on his claim). Compare *Noyes* v. *Quincy Mut. Fire Ins. Co.*, 7 Mass. App. Ct. 723, 726-727 (1979) (summary judgment should not have entered where undisputed facts showed triable issue concerning defendants' knowledge or wilfulness in violating G. L. c. 93A).

D. *Prejudgment interest.* The plaintiffs contend that the defendants' retention of the rent overcharge entitled them to a separate award of prejudgment interest under G. L. c. 93A, § 9.[13] The plaintiffs claim that the retained unlawful rents constituted a violation of both Regulation 11 and G. L. c. 93A, § 2 (*c*),[14] and the continued deprivation of this money warrants compensation in the form of prejudgment interest. The plaintiffs propose that we imply, in G. L. c. 93A, § 9, the authority of courts to award prejudgment interest as part of the damages in a consumer's claim so as to facilitate the statute's objective of promoting reasonable settlements between the parties. See *International Fidelity Ins. Co.* v. *Wilson*, 387 Mass. 841, 857

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[13]General Laws c. 93A, § 9(1), prior to 1979 (as amended through St. 1971, c. 241), provided in pertinent part: "Any person who purchases or leases goods, services or property, real or personal primarily for personal, family or household purposes and thereby suffers any loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive act or practice declared unlawful by section two or by any rule or regulation issued under paragraph (c) of said section two may . . . bring an action in the superior court in equity for damages . . . ."

Only the members of the plaintiff class who were awarded damages for their payment of the unlawful rent are seeking additional damages on this appeal. The plaintiffs asserted a claim for interest on the amount of the unlawful rent overcharge under G. L. c. 93A, § 9, in their second and third amended complaints.

[14]On the plaintiffs' claim that the defendants violated G. L. c. 93A, § 2 (c), by their violation of Regulation 11, the judge awarded summary judgment to the plaintiffs.

(1983).[15] The difficulty with this argument is that, while the plaintiffs sought cumulative damages under c. 15 and G. L. c. 93A, they did not raise specifically the claim of prejudgment interest before the judge. This issue is not properly before us, as it is raised for the first time on appeal. See *Jones* v. *Wayland*, 374 Mass. 249, 252-253 n.3 (1978). Assuming, however, that damages under G. L. c. 93A, § 9, can be computed as "interest" for loss of the use of money wrongfully detained, see *Guenard* v. *Burke*, 387 Mass. 802, 809 (1982), the question remains whether such damages should be cumulatively awarded.[16]

The judge, in his amended order, took cognizance of the *McGrath* v. *Mishara*, 386 Mass. 74 (1982), and *Wolfberg* v. *Hunter*, 385 Mass. 390 (1982), decisions and, in order to avoid cumulative damage recovery, allowed recovery only under c. 15. The amended order thus superseded his earlier order granting multiple damages to the plaintiffs pursuant to G. L. c. 93A, § 9 (1). On the basis of the *Mishara* and *Wolfberg* decisions, we conclude that separate damages may not be recovered under both c. 15 for the defendants' unlawful demand for rent and G. L. c. 93A, based on the defendants' unlawful retention of the amounts collected. The illegal acts involve the defendants' conduct in demanding and, in some cases, receiving the unauthorized rent increase, in violation of both the ordinance and G. L. c. 93A. Thus, where the plaintiffs have sustained their claim to recover multiple damages, under c. 15,

[15] The plaintiffs rely on a provision of the Clayton Antitrust Act as an analogous statute to § 9, which provides that a plaintiff who has been injured by a violation of the antitrust laws may move to recover simple interest on the actual damages awarded on this claim. See 15 U.S.C. § 15 (1976 & Supp. 1981), as amended by 1980 Pub. L. 96-349, § 4 (a) (1), 94 Stat. 1156. We decided, however, that the Legislature consciously chose not to follow § 15 of the Clayton Act in enacting § 9. See *International Fidelity Ins. Co.* v. *Wilson*, *supra* at 855.

[16] The plaintiffs who paid the rent overcharge to the defendants were denied the use of the illegal increase which, the judge concluded, was demanded and received in violation of G. L. c. 93A, § 9 (c). The plaintiffs' loss of the use of this amount of money resulted from this violation of the Consumer Protection Act, *Guenard*, *supra* at 809-810, and the defendant's refusal, on demand, to tender the amount of the overcharge due the plaintiffs.

they are precluded from duplicate recovery based on claims alleging the same wrongful conduct under G. L. c. 93A. See *Mishara, supra* at 85. Although the plaintiffs may recover under whichever statute offers them the greater amount of damages for the defendants' same wrongful conduct, see *Mishara, supra* at 84, there is no showing on this record that, if damages were set under c. 93A, they would have received a larger award. There was no error.

3. *Scofield's Individual Action.*

A. *Facts.* Berman & Sons notified Scofield by letter dated June 27, 1977, that her current lease was to terminate August 31, 1977, in conformance with its terms. The letter further stated that Scofield could extend her tenancy for an additional year under the lease addendum which incorporated the rent increase approved by the Boston Rent Board. Because Scofield thought that she could not afford to pay the rent and decided to find subsidized housing, she chose not to sign the addendum. Instead, she requested permission to remain as a tenant at will and pay the new rent until she could find cheaper housing. At that time, Scofield could not provide Berman & Sons with an estimated date by which she could vacate her apartment. According to the procedure at Berman & Sons, a committee comprised of Martin Berman, Donna McCormack, William Allen, and another employee reviewed the tenant's request to become a tenant at will. The committee denied Scofield's request by means of a letter to her attorney, authored by Allen and dated July 14, 1977. In the letter Allen stated that he believed that the Housing Court's order allowed him only to offer the new one-year lease at maximum rent, and that he expected Scofield either to sign the lease addendum or to notify him that she would vacate the apartment.[11]

B. *Damages pursuant to G. L. c. 93A, § 9.* In November, 1981, the judge issued his order on Scofield's individual claims under G. L. c. 186, § 18, and G. L. c. 93A, following a one-day trial on these issues. The judge ruled that Scofield could

[11] Scofield's counsel responded, by letter, that his client was offering to pay the new maximum rent under a tenancy at will.

not recover damages under G. L. c. 93A, since the statute, as it read prior to the 1979 amendment, required the consumer to show a loss of tangible real or personal property resulting from the unfair or deceptive act or practice. See *Baldassari* v. *Public Fin. Trust*, 369 Mass. 33, 44-45 (1975). The judge found that Scofield had suffered no damages under G. L. c. 93A as a result of the defendants' refusal to allow her to remain as a tenant at will.[18]

Scofield does not dispute the correctness of the judge's ruling that she suffered no monetary damages under G. L. c. 93A. Instead, she claims that the defendants' failure to satisfy her rightful claim under G. L. c. 186, § 18, once a formal written demand had been made, amounted to a loss of money or property under G. L. c. 93A. Scofield cites no case law to support this contention. Since her claim is based on G. L. c. 93A, § 9, prior to its 1979 amendment, we conclude that her claim is untenable because it does not allege an actual loss or deprivation of money or other property. See *Baldassari*, *supra* at 45.

C. *The "reprisal" claim*. On Scofield's claim under G. L. c. 186, § 18, the judge found that Scofield had proved by a preponderance of the credible evidence that one of the defendants' principal motives in refusing her request to remain as a tenant at will in July, 1977, was her report of the defendants' unlawful conduct to the Rent Board in 1977.[19] In his later order for supplemental findings and entry of an amended judgment, the judge adopted other specific findings of fact, requested by Scofield, relevant to the defendants' "motive." There was no evidence that any tenant, other than Scofield, had been denied a request to occupy as a tenant at will. The judge found that

[18] Scofield vacated her apartment upon the expiration of her lease. She did not pay the increased rental charge. Indeed, she realized a significant savings in her housing cost at her new subsidized premises.

[19] The judge correctly applied the version of G. L. c. 186, § 16, prior to its 1978 amendment. The judge noted that Scofield's factual scenario did not involve any of the circumstances in the statute which gave rise to a presumption of retaliation. See G. L. c. 186, § 18 (receipt of notice of termination, substantial increase in rent, or substantial alteration in terms of tenancy within six months of tenant's complaint creates rebuttable presumption that notice is reprisal against tenant).

there were seventeen other tenants of the defendants who had been granted tenancies at will and who were living under such agreements between September and December, 1977, and there was no record why thirteen of these tenants were granted tenant-at-will status. By April, 1978, several of these tenants had occupied as tenants at will for time periods ranging from nine to fifty months.[20] Certain other members of the plaintiff class were given tenant-at-will status by the defendants in August, 1977, and by May, 1978, the defendants had adopted a policy of requiring all their tenants to utilize at-will agreements.

The judge, however, concluded that the defendants' refusal to accord Scofield tenancy-at-will status was not a "reprisal" within the meaning of G. L. c. 186, § 18. The judge noted that the statute does not define "reprisal" except to provide that certain action, such as a substantial alteration in the terms of the tenancy or a termination of the tenancy within six months after the exercise of a tenant's legal rights, raises a rebuttable presumption that such action is a reprisal. The judge found unpersuasive Scofield's claim that Berman & Sons' refusal to allow her to remain as a tenant at will amounted to a violation of the statute where the defendant had no legal obligation to extend this benefit to her. The judge noted that it was Scofield who refused the defendants' offer to renew her lease. Scofield had no right to expect the defendants to accede to her request for a substantial alteration in the terms of her tenancy. Thus, the judge concluded that the defendants' conduct did not constitute a reprisal against Scofield for her legally protected actions under G. L. c. 186, § 18, and therefore entered judgment in favor of the defendants on all Scofield's individual claims.

Scofield claims that G. L. c. 186, § 18, should be construed to prohibit a landlord's refusal, based on a tenant's exercise of protected rights, to extend to that tenant a benefit that regularly has been accorded other tenants. The defendants contend that Berman & Sons' refusal to allow Scofield to remain as a

[20] The judge found Scofield's reason for wanting at-will tenancy was the type of reason which, under normal circumstances, would have resulted in the landlord's acceding to the tenant's request.

tenant at will was not a "reprisal" within the meaning of G. L. c. 186, § 18. The defendants correctly point out that no Massachusetts case has ever held, or implied, that a landlord's refusal to grant a tenant's request to occupy as a tenant at will constitutes a reprisal. But cf. 940 Code Mass. Regs. § 3.17 (6) (b) (1981) (unfair or deceptive practice under G. L. c. 93A for property owner to "retaliate in any manner against a tenant for exercising . . . any legal rights as set forth in c. 186, § 18").

We begin our construction of G. L. c. 186, § 18, with the words of the statute, which must be given "their usual and ordinary meaning considered in light of the aim to be accomplished by the Legislature." See *Prudential Ins. Co.* v. *Boston*, 369 Mass. 542, 546 (1976). General Laws c. 186, § 18, prior to its 1978 amendment, provided in pertinent part: "Any person . . . who threatens to or takes reprisals against any tenant of residential premises for reporting to . . . any . . . board having as its objective the regulation of residential premises a violation or a suspected violation of any health or building code or of any other municipal by-law or ordinance or state . . . law . . . which has as its objective the regulation of residential premises . . . shall be liable for damages . . . ."

The legislative history of the statute demonstrates that the Legislature intended the law to apply to a broad range of factual situations wherein tenants are retaliated against for seeking to enforce protected rights under our housing laws. See 1969 Senate Doc. No. 1327. Although proposed drafts of the statute limited its coverage to tenants who reported sanitary or building code violations, see 1969 Senate Doc. No. 1139, § 127K, 1969 House Doc. No. 2926, the law, as enacted, applied to tenants who complained of violations of any "municipal ordinance or state law" which has "as its objective the regulation of residential premises." G. L. c. 186, § 18. Clearly the ordinance involves the regulation of residential premises. The Legislature subsequently broadened the statute's coverage to include tenants who participated in a tenants' union, or similar organization, or who reported a violation of Federal law regulating residential premises. See St. 1972, c. 99, § 1. In 1973, the statute was amended again to apply to tenants who exercised

their rights to be reimbursed for paying their landlord's gas or electric bills. See St. 1973, c. 858, § 3 (inserting reference to G. L. c. 164, § 124D).[21] The Legislature's usage of broad language in the initial statute and its amended versions to describe activities protected against reprisal by a landlord, and its expansion of these protected activities in subsequent amendments, lead us to conclude that G. L. c. 186, § 18, protects a tenant who was retaliated against by a landlord for reporting violations of the rent control ordinances.

General Laws c. 186, § 18, prohibits a threatened or actual "reprisal" against a tenant for engaging in a protected activity. The ordinary meaning of a "reprisal" is "a retaliatory act." Webster's Ninth New Collegiate Dictionary at 1,000 (1983). We construe G. L. c. 186, § 18, to utilize this broad definition tailored, however, to achieve the statutory objective of protecting those tenants who have been retaliated against by landlords due to their exercise of legal rights under the housing laws. Cf. *Prudential Ins. Co., supra* at 547 (courts must construe statute as written and a contingency for which no provision made does not warrant judicial legislation). We think that if the Legislature had intended "reprisal" to have a narrow meaning, it would have specified those acts which would constitute a reprisal, and it would not have provided, in a separate paragraph that "[t]he receipt of any notice of termination of tenancy . . . or, of any substantial alteration in the terms of the tenancy within six months after the tenant has commenced, proceeded with, or obtained relief in such action . . . [or] made such report or complaint [relating to the building in which the tenant resides] shall create a rebuttable presumption that such notice . . . is a reprisal against the tenant for [making such report or complaint]." G. L. c. 186, § 18, as appearing in St. 1978, c. 149, § 1. By its terms, the statute extends to "reprisals"

[21] The statute again was amended in 1978, extending coverage to tenants who were retaliated against, based on their commencement of actions or attainment of relief in actions to enforce laws which regulate residential premises. See St. 1978, c. 149, § 1.

other than those acts which give rise to the rebuttable presumption described in the latter paragraph.[22] Cf. G. L. c. 239, § 2A.

It is indisputable that a lessor has no legal duty to permit a tenant to occupy the demised premises following the termination of her lease or tenancy, and may bring an action for summary process against the tenant who wrongfully holds over in the premises. See *Gunsenhiser* v. *Binder*, 206 Mass. 434, 437 (1910); G. L. c. 239, § 1. There is, however, considerable persuasive authority, from courts of other jurisdictions, which indicates that a lessor lawfully may not terminate a tenancy when that action is taken in retaliation for the tenant's reporting violations of the housing laws.

In support of the principle that landlords may not seek to evict tenants for reporting violations of housing laws is the landmark case of *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. denied, 393 U.S. 1016 (1969). The landlord in *Edwards* gave the tenant proper statutory notice to vacate her apartment soon after she reported sanitary code violations, and he obtained a judgment for possession of the premises. *Id.* at 688-689. Judge J. Skelly Wright noted that, under the District of Columbia housing code, a landlord has the right to evict a tenant with or without cause. *Id.* at 688. The need effectively to implement and enforce remedial legislation such as the housing and sanitary codes, however, impliedly prohibited landlords from evicting tenants from month to month in retaliation for their reporting code violations. *Id.* at 699-700. "The notion that the effectiveness of [such] legislation will be inhibited if those reporting violations of it can legally be intimidated is so fundamental that a presumption against the legality of such intimidation can be inferred as inherent in the legislation even

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[22] Several State statutes have specifically delimited the proscribed types of retaliatory action which a landlord could not engage in to penalize a tenant for exercising protected rights. See, e.g., Ariz. Rev. Stat. Ann. § 33-1381 (1974) (increasing rent, decreasing services, or bringing or threatening to bring action for possession); Cal. Civ. Code § 1942.5(c) (West Supp. 1984) (increase rent, decrease services to which tenant entitled, or cause tenant to quit premises involuntarily); N.J. Stat. Ann. § 2A:42-10.10 (West Supp. 1983) (serving notice to quit or instituting any action against tenant for possession of premises).

if it is not expressed in the statute itself." *Id.* at 701-702. In reversing the judgment for the landlord and remanding the case, the judge concluded that the tenant must prove the factual issue whether the landlord had an impermissible retaliatory purpose in evicting the tenant. Several jurisdictions have followed the *Edwards* policy of encouraging tenants to report violations of the housing laws by interpreting their retaliatory action statutes or other housing laws to prohibit landlords from seeking to dispossess tenants for exercising these legal rights. See, e.g., *Schweiger* v. *Superior Court of Alameda County*, 3 Cal. 3d 507, 517 (1970); *Clore* v. *Fredman*, 59 Ill. 2d 20, 27-28 (1974); *Parkin* v. *Fitzgerald*, 307 Minn. 423, 428-429 (1976); *Delmat Corp.* v. *Kahn*, 147 N.J. Super. 293, 299-300 (1977); *Dickhut* v. *Norton*, 45 Wis. 2d 389, 399 (1970). Cf. *Silberg* v. *Lipscomb*, 117 N.J. Super. 491, 496 (1971) (under N.J. Stat. Ann. § 2A:42-10.10 [West Supp. 1983]). *Barela* v. *Superior Court of Orange County*, 30 Cal. 3d 244, 249 (1981). The salutary policy of the *Edwards* decision is applicable to the present case. Effective enforcement of the rent control laws is promoted when tenants are not inhibited in reporting suspected or actual violations of these laws by a fear of reprisal by landlords. We think that the Legislature may have anticipated that tenants would be deterred from disclosing landlords' infractions of the housing laws due to a landlord's largely unrestricted power to terminate tenancies at will. The enactment of G. L. c. 239, § 2A, also reflects a desire to protect tenants who report such violations under G. L. c. 186, § 18, from retaliatory terminations of their at-will tenancies.[3]

[3] General Laws c. 239, § 2A, as appearing in St. 1978, c. 149, § 2, provides, in relevant part: "It shall be a defense to an action for summary process that such action or the preceding action of terminating the tenant's tenancy, was taken against the tenant for the tenant's act of commencing, proceeding with, or obtaining relief in any judicial or administrative action the purpose of which action was to obtain damages under or otherwise enforce, any federal, state or local law, regulation, by-law, or ordinance, which has as its objective the regulation of residential premises, or exercising rights pursuant to section one hundred and twenty-four D of chapter one hundred and sixty-four, or reporting a violation or suspected violation of law as provided in section eighteen of chapter one hundred and eighty-six, or organizing or joining a tenants' union or similar organization."

The efficacious implementation of rent control laws will not support a decision which would require a landlord to allow lessees to become tenants at will after the expiration of their lease. A landlord has the unfettered right to dictate the type of tenancy under which a tenant may occupy the premises, and lawfully may refuse to let any tenant rent on an at-will basis. However, when a landlord has an established policy of allowing lessees to remain as tenants-at-will following the termination of their leases, the landlord cannot lawfully refuse to apply that policy to a tenant because that tenant has reported the landlord's violations of the rent control laws. Cf. *Golphin* v. *Park Monroe Assocs.*, 353 A.2d 314, 315, 317-318 (D.C. 1976). In *Golphin*, the Court of Appeals decided that a tenant who was denied an at-will tenancy following the expiration of his lease, in contravention to the landlord's established policy, could defend against a possession action by showing that the landlord's refusal was in retaliation for his tenant-organizing activities. *Id.*[24]

We conclude, based on the findings of the judge, that the defendants' refusal to allow Scofield to remain as a tenant at will following the expiration of her lease constituted a "reprisal" under G. L. c. 186, § 18, for her reporting the landlord's unlawful rent increase to the Rent Board. A landlord who refuses to apply an established policy of permitting at-will tenancies to a tenant because of her efforts to enforce the laws violates the legislative intent that there be good faith and fair dealing between landlords and their tenants. The judge concluded that Scofield had proved, by a preponderance of the

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[24] Similar to G. L. c. 186, § 18, Housing Regulations of the District of Columbia, Retaliatory Acts § 2910 (1982), is worded broadly: "No *action* or proceeding to recover possession of a habitation may be brought against a tenant, *nor shall an owner otherwise cause a tenant to quit a habitation involuntarily*, 'nor demand an increase in rent from the tenant, nor decrease the services to which the tenant has been entitled, nor increase the obligations of a tenant,' in retaliation against a tenant's: (a) Good faith complaint or report concerning housing deficiencies made to the owner or a governmental authority, directly by the tenant or through a tenant organization. (b) Good faith organization of or membership in a tenant organization. (c) *assertion of rights under these Regulations*." (Emphasis su

credible evidence, that "one of Berman's principal motives" for refusing Scofield's request was her reporting the unlawful increase to the Rent Board. Cf. *Robinson* v. *Diamond Hous. Corp.*, 463 F.2d 853, 865 (D.C. Cir. 1972) (in possession action, fact finder may find for landlord who presents evidence that legitimate business reasons principally motivated decision to evict tenant). Accordingly, Scofield is entitled to recover from the defendants, jointly and severally,[25] for their violation of G. L. c. 186, § 18, an amount equal to not less than one month's rent nor more than three months' rent, and reasonable attorneys' fees and costs of the suit.[26]

4. *Conclusion.*

We remand this case to the judge of the Housing Court to enter an appropriate order on Scofield's claim under G. L. c. 186, § 18, consistent with the principles expressed in this opinion. The judgment as to the class claim is affirmed.

So ordered.

LYNCH, J. (dissenting). I dissent only from that part of the opinion that concludes that the defendant landlord's refusal to

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[25] On the G. L. c. 186, § 18, claim, Scofield sought joint and several liability against Berman & Sons, Inc., William J. Allen, Martin S. Berman, and Lila Gross. The statute provides for joint and several liability by subjecting to payment of damages "any person or agent thereof . . . who takes reprisals" against a tenant of residential property.

We dismiss summarily Scofield's argument that G. L. c. 186, § 18, is a statute which exacts a penalty from wrongdoers with reference to the degree of their culpability, thereby entitling the plaintiff to recover damages from both Berman and Allen. In contrast to other statutes which specifically provide that the degree of a defendant's personal fault shall enter into the assessment of damages for which he is liable, G. L. c. 186, § 18, provides only that liability shall be no less than one month's rent nor more than three months' rent, or the amount of actual damages, *whichever is greater*. Cf. *International Fidelity Ins. Co.* v. *Wilson*, 387 Mass. 841, 856 (1983) (independent liability of defendants upheld under multiple damages provisions of G. L. c. 93A which assess individual fault of each wrongdoer).

[26] As Scofield admits, she suffered no actual damages as a result of the unlawful reprisal and her damages thus are limited to an amount no less than one month's rent and no greater than three months' rent. G. L. c. 186, § 18.

allow Scofield to remain as a tenant at will following the expiration of her lease constitutes a reprisal under G. L. c. 186, § 18, for her reporting the landlord's unlawful rent increase to the Rent Board. *Ante* at 114. The majority correctly point out that the landlord had no obligation to extend to Scofield tenant-at-will status at the expiration of her lease. Although the landlord refused Scofield's request for tenant-at-will status, she could have remained on the premises as a tenant at sufferance, *Iorio* v. *Donnelly*, 343 Mass. 772 (1961). Without delving at length into the law of tenancies at sufferance under modern legislation (see *King* v. *G & M Realty Corp.*, 373 Mass. 658, 663-664 [1977]), I conclude that this change of status was not significant enough to constitute a "reprisal" by the landlord. It is clear that as a tenant at sufferance she could have remained on the premises until the landlord took action to regain possession, *King* v. *G & M Realty Corp.*, *supra*, and during the period of her occupancy she remained obligated to pay rent. G. L. c. 186, § 3. I conclude that no reprisal existed in such a situation, at least until the landlord issued a notice to quit or took some other affirmative step to regain possession.

All of the decisions cited in the majority opinion concerning other jurisdictions deal with evictions, and typically these decisions find retaliatory action to be a defense to proceedings instituted by the landlord to regain possession. The present case differs from those eviction cases in that the defendant landlord here took no affirmative action to dispossess the plaintiff of the apartment. For example, in *Golphin* v. *Park Monroe Assocs.*, 353 A.2d 314 (D.C. 1976), the tenant, denied at-will status at the expiration of a lease, remained in the apartment and successfully defended an eviction proceeding. The court based its decision explicitly on the *improper use of judicial process* that occurs when a landlord brings eviction proceedings for retaliatory reasons. *Id.* at 317-318. I view this line of decisions from other jurisdictions as an indication of judicial reluctance to see the courts used as an instrumentality by landlords seeking illegal retaliation.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss: HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
CIVIL ACTION
NO. 06165

LANA J. SCOFIELD, A. LARRY BERRIN, on behalf of themselves and on behalf of all those similarly situated and the BOSTON RENT BOARD

vs

BERMAN & SONS, INC., WILLIAM J. ALLEN, MARTIN S. BERMAN and LILA GROSS

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RELATIVE TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST DEFENDANTS BERMAN & SONS, INC., MARTIN S. BERMAN and LILA GROSS

The plaintiffs have filed a motion on behalf of the class they represent for partial summary judgment, pursuant to Mass. R. Civ. P. 56(a), with respect to the causes of action asserted in paragraphs 26 and 27 of the Second Amended Complaint and the plaintiffs' seek relief in accordance with prayers 2,

3 and 3.1 of the prayers for relief contained in the Second Amended Complaint. After reviewing the pleadings, the answers to interrogatories, the admissions and the affidavits on file, I find that there is no geniune issue as to any material fact relating to the claims for which summary judgment is sought. Based on the foregoing record, the Court makes the following findings of fact and conclusions of law.

(1) This Civil Action was filed on May 12, 1977, as a class action, by tenants who sought injunctive relief, declaratory relief and damages on behalf of themselves and other persons similarly situated from whom illegal rental charges had allegedly been demanded and/or received by the defendants. After hearing, the Court on June 21, 1977

issued a preliminary injunction prohibiting the defendants from collecting certain rents.

(2) On June 21, 1977 the Court entered an Order permitting the plaintiffs to maintain this action as a class action on behalf of themselves and on behalf of certain other similarly situated individuals. On March 13, 1978 the Court entered an Order expanding the scope of the class represented by the plaintiffs. The plaintiffs now represent the following class of individuals:

> All persons who have been residing as tenants under a written lease with the defendants since November 24, 1976 at 1800, 1810, 1820 or 2045 Commonwealth Avenue, 66-70 or 90 Chiswick Road, all in the Brighton section of Boston, Massachusetts, whose premises are subject to Rent Control, and whose tenancies are governed by a form of apartment lease utilizing a clause with language identical or substantially the same as that contained in paragraph number 33 of the lease

executed by the named plaintiffs.

Approximately twenty-five (25) persons were excluded from the class at their request so that the class presently is comprised of eighty-nine (89) individuals and the estate of one other person. The class members occupied some 76 housing units in December of 1976. Exhibit A of these findings contains the name of each member of the class and their address as of December, 1976.

(3) At all times relevant to this action, the plaintiff Lana J. Scofield was a resident of 1800 Commonwealth Avenue, Apartment 27, in the Brighton section of Boston, Massachusetts.

(4) At all times relevant to this action the plaintiff A. Larry Berren was a resident of 70 Chiswick Road, apartment number 2 in the Brighton section of Boston, Massachusetts.

(5) The defendant Berman & Sons, Inc. (hereinafter Berman & Sons) is a Massachusetts business corporation with a principal place of business at 52 North Street, Stoneham, Massachusetts. Said defendant is the managing agent for the owners of the apartment buildings situated at 1800, 1810, 1820, 2045 Commonwealth Avenue, 66-70 and 90 Chiswick Road, all of which are situated in the Brighton section of Boston. Said defendant was the lessor with respect to the leases signed by the members of the plaintiff class. Martin S. Berman is the President of Berman & Sons.

(6) The defendant William J. Allen (hereinafter Mr. Allen) was at all times material to this case the defendant Berman & Sons' property manager. His office was located at 1800 Commonwealth Avenue, Brighton, Massachusetts. The

instant motion for partial summary judgment does not involve any of the claims asserted against Mr. Allen.

(7) Martin S. Berman and Lila Gross are the general partners of Berman Central Realty a Massachusetts Limited Partnership and owner of the premises located at:

66-70 Chiswick Road, Brighton

90 Chiswick Road, Brighton

1800 Commonwealth Avenue, Brighton

1810 Commonwealth Avenue, Brighton

2045 Commonwealth Avenue, Brighton

Said defendants employ Berman & Sons and Mr. Allen as, respectively, managing agent and property manager with respect to all of the apartment buildings which are the subject of this action except for the apartment building situated at 1820 Commonwealth Avenue.

(8) The plaintiff Boston Rent Board (hereinafter "the Rent Board") is, empowered, pursuant to Chapter 15 of the City of Boston Ordinances of 1975, (which regulates certain residential rents and evictions) to establish and adjust the maximum rent that can be charged for housing accomodations within the purview of said Ordinance. The Rent Board's motion to intervene as a plaintiff was allowed in June, 1980.

(9) In 1975 both of the named plaintiffs signed a form lease with the defendant Berman & Sons. Both leases were for a term of one year and from year to year thereafter unless terminated by either party as provided for by the lease. Both leases were in effect at all times material to this case.

(10) The apartment occupied by the plaintiff class, as defined by this

Court's Order of March 13, 1978, were subject to Boston's rent control ordinance, Chapter 15 of the Ordinances of the City of Boston of 1975. On November 24, 1976 the Rent Board authorized a general rent adjustment for housing subject to rent control in the City of Boston. This general rent adjustment was authorized for the properties occupied by memebers of the plaintiff class on December 16, 1976 when the Boston Rent Board authorized a general rent adjustment subject to the following:

> A. Subject to the provision of this regulation, the new maximum rent as established by this regulation may not be charged until the expiration of the lease or tenancy existing on the effective date of this regulation, or unless the tenant is given the option of terminating the tenancy under a provision of the lease agreement. (emphasis supplied) Regulation 11, Section 12.

(11) The form lease executed by members of the plaintiff class did not contain a provision providing for the termination of the tenancy during the term of the lease. The form lease executed by members of the plaintiff class contained the following clause:

> 33 Rent Control
> Notwithstanding anything herein to the contrary:
> (A) Lessee shall pay only the maximum rent allowed under applicable rent control laws or other laws regulating rents.
> (B) If during the term of this lease or any extension or renewal thereof, rent control laws or laws regulating rents remain in effect or become applicable to the demised premises and the Lessor is authorized or permitted to increase the maximum rent for the demises premises, then the rent to be paid by the lessee hereunder, commencing with the effective date of such authorization or permission shall be the maximum rental so authorized or permitted.

(12) In January and February, 1977 Berman & Sons sent out notices to members of the plaintiff class advising said tenants that the maximum rent authorized by the December 16, 1976 general rent adjustment would be effective with respect to their apartments as of January 1, 1977. The plaintiff Scofield was notified that her rent had been increased from $217 a month to $240 per month. Plaintiff Berren was notified that his rent had been increased from $205 per month to $227 per month.

(13) The Rent Board advised certain of the tenants that the requested increase was not lawful and some of the tenants refused to pay the increase.

(14) Berman & Sons knew or should have known as of February, 1977 that it was not entitled to implement the December 16, 1976 general rent adjustment

on January 1, 1977 with respect to those tenants who are members of the plaintiff class. There is no dispute that Berman & Sons was notified of the Rent Board's position on the following three occasions in January and February, 1977:

a. On or about February 11, 1977 the plaintiff Scofield returned Berman & Sons' February 8, 1977 notice of rent increase with a note that she had been advised by the Rent Board to continue paying the $217 as provided for in her lease.

b. On February 16, 1977, a Rent Board compliance investigator wrote to Berman & Sons advising said defendant that it had come to his attention that the said defendant was trying to enforce clause 33 of the lease which was illegal because it did not permit the tenant the right either to accept the higher rent or

leave. Said letter informed the defendant Berman & Sons that "if you have any questions please call me at 722-4630 ext. 127".

c. In addition, another tenant, Molly Zuckernik, who lived in apartment 28 at 1820 Commonwealth Avenue, advised defendant Berman & Sons by letter dated January 21, 1977 that she had spoken to Mr. Charles O'Hearn at the Rent Board on January 18, 1977 in connection with Berman & Sons January 13, 1977 notice of rent increase and that she was advised by Mr. O'Hearn that clause 33 of the lease is invalid and that she was not obligated to pay the requested increase until her lease terminated on March 1, 1977.

(15) As of December 1976 all members of the plaintiff class, pursuant to the terms of their leases, were being charged the maximum rent authorized by

the Rent Board. A number of the plaintiff class members refused to pay the rent increase demanded by Berman & Sons effective January 1, 1977. As a result, Berman & Sons commenced small claims actions against at least twenty (20) tenants. In addition, said defendant sent notices to quit for non-payment of rent to certain members of the plaintiff class as a result of their refusal to pay the increase. Some of the tenants agreed to pay the rent increase under protest after being sued, including plaintiff Berren.

(16) On June 21, 1977 the Court issued a preliminary injunction against the defendants prohibiting them from pursuing any legal remedies against class members for the collection of the general rent adjustment authorized by the Rent Board on December 16, 1976, from

terminating the tenancy or seeking possession of the premises occupied by class members solely on the grounds of non-payment of the said general adjustment, from demanding, assessing, or collecting from any member of the class the said general adjustment unless a new lease executed by the tenant authorized receipt of said payment or unless the tenant agreed in writing to pay the demanded rent. The June 21, 1977 injunction did not afford any protection to tenants residing at 90 Chiswick Road or 1820 Commonwealth Avenue who were not included within the plaintiff class until March 13, 1978.

(17) On May 1, 1978, after hearing, the Court found defendants Allen and Berman & Sons in contempt of this Court's June 21, 1977 injunction because they continued to collect, after June 21,

1977, the December 16, 1976 general adjustment. Pursuant to this Court's Order of May 1, 1978, the defendants refunded certain rent overcharges received by the defendants in violation of this Court's June 21, 1977 Order. (See Defendants' Report of Complaince with the Order of Compliance of the Court dated May 1, 1978).

(18) The defendants Martin Berman and Lila Gross as the owners of the property in question (except 1820 Commonwealth Avenue) and as principals for whom the defendant Berman & Sons is employed are liable for the conduct of Berman & Sons. This, in substance, is the allegation made in paragraph 5.2 of the Second Amended Complaint which was neither admitted nor denied by the defendants' Answer and is, therefore, deemed admitted. Mass. R. Civ. P. 8(d).

Defendants Berman and Gross, as general partners of a limited partnership, would, under Massachusetts law, be liable jointly and severally for the actions of their agents describe in these findings. G.L. c. 108A §15 and G.L. c. 109 §9. See also Section 1(g) of Chapter 15 of the Ordinances of 1975 which provides that "the rights and duties of the landlord shall be the obligation of anyone who manages . . . on behalf of the landlord".

VIOLATION OF SECTION 12 OF REGULATION 11 OF THE RENT BOARD

(19) Paragraph 26 of the Second Amended Complaint alllegs [sic] that the defendants imposed and sought to impose rent increases on the plaintiff class in violation of Chapter 15 of the Ordinances of 1975 and the regulations of the Rent Board promulgated pursuant to said ordinance. Secton 9(a) of Chapter 15 of

the Ordinances of 1976 provides in relevant part that:

> Any person who demands, accepts, receives or retains any payment or rent in excess of the maximum lawful rent, in violation of the provisions of this Ordinance, or any rule, regulation, or order hereunder promulgated shall be liable. . .to the person from whom such payment is demanded, accepted or received or retained, . . .for reasonable attorneys fees and costs as determined by the Court, plus liquidated damages in the amount of $100 or not more than three times the amount by which the payment or payments demanded, accepted, received or retained exceed the maximum rent which could be lawfully demanded, accepted, received or retained whichever is the greater; provided that if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurence of the violation the amount of such liquidated damages shall be in the amount of the overcharge or overcharges.

(20) Section 12 of Regulation 11 of the Boston Rent Board, promulgated on December 16, 1976 to implement the

November 24, 1976 general adjustment, provides:

> A. Subject to the provisions of this regulation the new maximum rent as established by this regulation may not be charged until the expiration of any lease or tenancy existing on the effective date or this regulation or unless the tenant given the option of terminating the tenancy under a provision of the lease agreement.

(21) Paragraph 33 of the lease form executed by the members of the plaintiff class did not contain a provision giving the tenant the option of terminating the tenancy rather than paying a rent increase. For this reason, Section 12 of Regulation 11 of the Rent Board prohibited the defendants from implementing a rent increase pursuant to the November 24, 1976 general adjustment until the expiration of the leases between Berman & Sons and the members of the plaintiff class. Despite this, the

defendants demanded, and in some cases received, rent increases which they were prohibitted from demanding or receiving by Section 12 of Regulation 11 of the Rent Board.

(22) In defending against the alleged violation of Section 12 of Regulation 11 the defendants argue that:

(a) the aforementioned regulation is invalid because the Rent Board lacks the power under the Ordinance to regulate the implementation of rent increases;

(b) the Rent Board lacks the power to regulate the implementation of rent increases because that area is already regulated by state statute and;

(c) the regulation is violative of the United States Constitution because it deprives the defendants of rights under their contracts without due process of law; and

(d) even if the regulation in question is valid and was violated, the damages awarded should be limited to the amount of the overcharge because the violation was neither willful nor the result of failure to take practicable precautions against the occurence of the violation.

a. POWER OF THE RENT BOARD

(23) In considering the validity of the regulation in queston the Court is mindful that a "regulation stands in the same footing as would a statute, ordinance, or bylaw. . .all rational presumptions are made in favor of the validity of every legislative enactment". Druzik v. Board of Health of Haverhill, 324 Mass. 129, 138 (1949). Where an administrative agency is vested with the broad authority to effectuate the

purposes of a law, as in the case of the Rent Board pursuant to Chapter 15 of the Ordinances of 1975, the validity of a regulation promulgated thereunder must be sustained if it is "reasonably related to the purpose of the enabling legislation". Consolidated Cigar Corporation v. Department of Public Health 372 Mass. 844, 855 (1977), citing Mourning Family Publication Service, Inc., 411 U.S. 356, 369 (1973) which quoted from Thorpe v. Housing Authority of Durham, 393 U.S. 268, 280-281 (1969). "An agency's powers are shaped by its organic statute taken as a whole". Comm. v. Cerveny 373 Mass. 345, 354 (1977). "An agency is given considerable leeway in interpreting a statute it is charged with enforceing" and "a regulation may be authorized even where it cannot be traced to specific statutory language". Grocery

Manufacturers of America v. Department of Public Health, Mass. Adv. Sh. (1979), 2291, 2296. It is also clear "that no more need by discerned than some rational relation between the regulation and the empowering statute". White Dove Inc. v. Director of Division of Marine Fisheries, Mass. Adv. Sh. (1980) 1043, 1049. In summary, the law in Massachusetts is clear that an administrative agency has broad powers to promulgate regulations pursuant to enabling legislation and that all ratonal presumptions are to be made that the regulaton is valid. So long as the regulation is reasonably related to the purposes of the statute the regulation must be held valid.

(24) Since there is no dispute that a regulation "must be within the ambit of the enabling legislation", Commonwealth v. Diaz 326 Mass. 525, 527

(1950), it is appropriate to examine the enabling legislation relied on by the Rent Board to support the promulgation of Regulation 11, §12. Section 2(c) of said Ordinance provides that:

> The board shall promulgate such policies, rules, rulings and regulations. . .as will further the provisions of this Ordinance. The board shall. . .establish and adjust the maximum rent that may be charged for housing accomodation. . . .

Section 5(a) provides that:

> The board shall. . .make such individual or general adjustments. . .as may be necessary to remove hardships or to correct other inequities. . . .

Secton 6(b) of said Ordinance provides that:

> On its own initiative, the board may make a general adjustment. . .of the rental levels for any class of housing accomodation subject to such conditions, if any, as the board, shall determine.

The Preamble to Chapter 15 declares that there is a public emergency in the City of Boston with respect to residential hosuing [sic], that this emergency results from a critical shortage of housing and that:

> This emergency cannot be dealt with effectively. . .unless rents are regulated and controlled so that rents will not be increased unreasonably and landlords will receive a fair net operating income from housing accomodations. . . .

(25) It is clear from the Preamble and Sections 2(c), 5(a) and 6(b) that the Rent Board was granted the power to promulgate regulations affecting general rent adjustments and to condition said general adjustments in order to "remove hardships or to correct other inequities". See Palmer v. Rent Board of Brookline, Mass. App. Adv. Sh. (1970) 260, 271 (The statute "would appear to permit the board to condition a rental

increase on the property's future compliance with the State Sanitary Code"). Pursuant to this mandate, it was reasonable for the Rent Board to take into consideration the fact that many tenants who are under a lease might not be able to afford to pay the eleven percent general adjustment and that it was equitable to both parties to delay the implementation of a rent increase until the expiration of a lease unless the lease contained a provision which would give the tenant the option of paying the rent increase or moving out. In many instances this meant a delay of a few months in implementing the increase and at most a delay of eight months. For this reason, the Court finds no merit in the defendants' argument that the Rent Board lacked the power pursuant to the

enabling legislation to regulate the implementation of rent increases.

b. PREEMPTION BY STATE STATUTES

(26) The defendants also argue that the Rent Board lacked the authority to regulate the implementation of the general adjustment because that area has been preempted by a separate body of state law, specifically, G.L. c. 186 and G.L. c. 93A. There is no question that the General Court could have so regulated the area of the implementation of rent increases so as to preempt the Rent Board from enacting any regulations inconsistent with the General Court's statutory scheme. However, the existence of a state statute on a particular subject does not automatically prohibit the enactment of local regulations on the

same subject. As the Supreme Judicial Court has held:

> The existence of legislation on a subject. . .is not necessarily a bar to the enactment of local ordinances and bylaws exercising powers or functions with respect to the same subject. If the State legislative purpose can be achieved in the face of a local ordinance or bylaw on the same subject, the local ordinance or bylaw is not inconsistent with the State legislation, unless the Legislature has expressly forbidden the adoption of local ordinances and bylaws on that subject.
> Bloom v. Worcester, 363 Mass. 136, 156 (1973)

In a later case challenging two amendments to Article XXXVIII of the bylaws of Brookline which regulated condominium conversion evictions, the Supreme Judicial Court, in response to the argument that the bylaw amendments were preempted by state statutes dealing with condominium conversions, established a two part test to determine whether the local bylaw was preempted by state law.

Under this test, a conflict between local and state law can be said to exist when either one of the two following criteria is met: (1) the legislature made it clear that it intended to preclude local action or (2) the existence of the local bylaw makes it impossible to achieve the purpose of the state statute. Grace v. Town of Brookline, Mass. Adv. Sh. (1979) 2257, 2269: It is evident that the defendants have not shown, on the facts of this case, that the General Court intended to preclude local action or that the ordinance in question interferes with the purpose of the statutes. There is nothing in General Law c. 186 which is inconsistent with the regulation in question or which suggests that the General Court intended to preempt this area. To the contrary, the General Court in enacting Chapter 863 of the Acts of

1970 authorized the City of Boston to enact an ordinance controlling rents. Chapter 15 of the Ordinance of 1975 implements this general grant of authority. Likewise, there is nothing in the regulations of the Attorney General pursuant to G.L. c. 93A, §2(c) which indicates that the regulation in question is in any way inconsistent with the enforcement of the Attorney General's regulations. The Preeable to the Attorney General's Ch. 93A Regulations provides that:

> These rules and regulations are not intended to be all inclusive as to the types of activities declared unlawful by section 2(a) but are intended to be of general application.
> 940 C.M.R. Regulation 3:00

Section 3.17(3)(a)1 of the Chapter 93A Regulations provide that it shall be an unfair and deceptive trade practice for a landlord to include in a rental agreement

any term which violates any law. The word "law" is defined in section 301(12) as to include "any federal, state, or local statute, ruling, regulation, code, ordinance or bylaw". Thus, it is clear from the Attorney General's Regulations, that the Regulations anticipated certain local ordinances regulating the landlord/tenant relationship would also constitute a violation of Ch. 93A. Counsel for the defendant have cited the case of Weinstein et al v. Gordon, et al (Civil Acton 5478) in which Chief Justice Daher of the Boston Housing Court stated in a June 21, 1977 decision that he did not believe the Rent Board had the power to enact the regulation in question apparently because the Attorney General had promulgated regulations determining which practices were unfair and deceptive. ("It is also easily

discernable that: Section 12 implementation: A, is not within the power of the rent board" at p.14) The Weinstein case presented no issue concerning the authority of the Rent Board to enact Section 12 of Regulation 11 and Judge Daher cites no authority in support of his dictum and his position does not appear to be consonant with appellate decisions. For example in Dodd v. Commercial Union Insurance Co., 373 Mass. 72 (1977) the Supreme Judicial Court was faced with an issue analogous to the issue presented in this case. In Dodd the defendant insurer contended that it was not subject to Chapter 93A because it was regulated by G.L. c. 176D which specifically prohibited unfair or deceptive acts or practices in the insurance business. In holding that Ch.

93A and Ch. 176D overlapped but did not conflict the Supreme Judicial Court held:

> The mere existence of one regulatory statute does not affect the applicability of a broad nonconflicting statute, particularly when both statutes provide for concurrent coverage of their common subject matter. 373 Mass. at 782.

Likewise, in this case, the existence of the Attorney General's Ch. 93A Regulations do not affect the validity of Regulation 11, section 12 especially where the Ch. 93A Regulations specifically anticipated local regulation of the landlord/tenant relationship. Since the dictum in the Weinstein case, supra, does not square with the appellate authority in this Commonwealth, it will not be followed in this case.

c. CONSTITUTIONAL CLAIMS

(27) The defendants next argue that the regulation in question impairs

their contractual rights in violation of Article I §10 of the United States Constitution or otherwise deprives them of property without due process of law. Essentially, the defendants argue that the regulation in question is being applied retroactively to deprive them of rights under a contract which was executed prior to the date of the regulation. However, an examination of clause 33 of the lease demonstrates that the lease specifically provides that the landlord is not entitled to a rent increase during the term of the lease unless the Rent Board authorizes such a rent increase. ("If during the term of this lease. . .the lessor is authorized or permitted to increase the maximum rent [by the Rent Board]. . .then the rent to be paid by the lessee, commencing with the effective date of such authorization

or permission shall be the maximum rental so authorized or permitted.") Since Berman & Sons in drafting its' lease agreed that said defendant would not be entitled to a rent increase unless authorized by the Rent Board, the Court fails to see how the defendants can now argue that they are being deprived of their rights under the terms of the contract simply because the Rent Board never authorized the defendants to increase the rent of the members of the plaintiff class during the term of their leases. Moreover, even if there was some basis for finding that the defendants have been deprived of some right under the terms of the lease, there would still be no showing of constitutional deprivation because as the Supreme Judicial Court has held:

> Where a public emergency in housing exists, the Supreme

> Court of the United States has held that any rights contained in a private contract must yeild [sic] to rational legislative protection of public interest.

Huard v. Forest Street Housing Inc., 366 Mass. 203 (1974).

d. DAMAGES

(28) The defendants finally argue that even if the Court finds that the regulation in question is valid, the Court should not award more than actual damages since the violation was "neither willful nor the result of failure to take practicable precaution against the occurrence of the violation". Section 9(a) of Chapter 15 of the Ordinances of 1975. Section 9(a) places the burden of showing that the violation was not willful or the result of a failure to take practicable precautions against the occurrence on the defendants. Lynch v.

Abraham, 371 Mass. 892, 893 (1976). The undisputed facts establish that a Rent Board official advised Berman & Sons that clause 33 of the lease was invalid, that at least two members of the class advised Berman & Sons that they were informed by the Rent Board that the general adjustment increase could not be charged until the termination of their leases because clause 33 of the lease was invalid, that Berman & Sons on February 16, 1977 wrote a letter to plaintiff Scofield advising her that Berman & Sons disagreed with the Rent Board's position that no rent was due, and that even after this Court issued a Preliminary Injunction against the defendants from collecting the rent increases in question, Berman & Sons, in contempt of this Court's Preliminary Injunction of June 21, 1977 continued to accept the

rent increases in question. Based on these uncontested facts, the Court finds that, as a matter of law, the violation was, if not willful, then at least the result of a failure to take practicable precautions against the occurrence of the violation. Assuming for purposes of this motion for summary judgment, that Martin S. Berman, President of Berman & Sons, who is also an attorney licensed to practice law in this Commonwealth, did in fact consider the February 16, 1977 letter from the Rent Board (advising him that clause 33 of their lease was invalid and that he was not entitled to the rent increase until the termination of the leases) as a "prank" (contrary to the position taken in Berman & Sons' letter of February 16, 1977 to plaintiff Scofield) Mr. Berman should have at least taken the practicable precaution of

contacting the purported author of the letter or some other official of the Rent Board to determine whether the communication was, in fact, a "prank". For this reason, the Court finds that the defendants are liable to each member of the plaintiffs class for $100 or three times the amount of illegal rent received or demanded whichever is greater, plus reasonable attorney's fees.

GENERAL LAW CHAPTER 93A CLAIMS

(29) Paragraph 27 of the Second Amended Complaint alleges as follows:

> The Defendant Berman's actions in seeking to impose rental adjustments in the manner herein described, namely
>
> a) without having clearly and conspicuously disclosed, prior to the execution of the lease,
>
> (i) the nature of any scheme by which rents could or would be increased during the term covered thereby and

(ii) the magnitude or limits with respect to any such increase

b) without having offered members of the plaintiff class the opportunity, upon notification of a rental adjustment, to "opt out" of the lease by express provision or otherwise, without further liability for the remainder of the term, was an unfair or deceptive act and in violation of the Consumer Protection Act and regulations issued thereunder.

Thus, the Complaint alleges three violations of the Consumer Protection statute. The brief in support of the motion for partial summary judgment alleges a fourth violation, namely, that the demand for a rent increase from members of the plaintiff class prior to the termination of their leases pursuant to the December 16, 1976 general rent increase authorized by the Rent Board was an unfair and deceptive practice in violation of the Attorney General's Ch. 93A Regulations, 940 C.M.R. 3.16(3).

Since both parties have briefed this issue the Court, pursuant to Mass. R. Civ. P. 15(b) will amend the pleadings to conform to the evidence so as to include this alleged violation of 940 C.M.R. 3.16(3). Thus the plaintif class alleges four distinct violations of Chapter 93A, to wit:

1. Violation of 940 C.M.R. 3.16(3) and Section 12 of Regulation 11;

2. Failure to have clearly and conspicuously disclosed, prior to the execution of the lease, the nature of any scheme by which rents could or would be increased during the term covered by the lease;

3. Failure to have clearly and conspicuously disclosd prior to the execution of the lease, the magnitude or limits with respect to any such rent increase; and

4. Failure to have offered members of the plaintiff class the opportunity, upon notification of a rental adjustment, to "opt out" of the lease by express provision or otherwise, without further liability for the remainder of the term of the lease. With respect to the last three alleged violations of Chapter 93A, the Court finds that the defendants are entitled to summary judgment in their favor. The reasons for this finding are as follows. Prior to the enactment of Chapter 406 of the Acts of 1979, Section 9(1) of Chapter 93A only authorized a recovery under the statute where the consumer "suffers any loss of money or property, real or personal" resulting from an unfair or deceptive act or practice. The Supreme Judicial Court has interpreted "money" to mean money and "property" means "the kind of property

that is purchased or leased, not such intangibles as a right to a sense of security, a peace of mind, or to personal liberty". Baldassari v. Public Finance Trust, 369 Mass. 33, 45 (1975). Assuming for purposes of this motion for summary judgment that the plaintiff class has established that the use of clause 33 was an unfair and deceptive trade practice because it did not clearly and conspicuously disclose prior to the execution of the lease the nature of any scheme by which the rent could or would be increased during the term covered thereby and the magnitude or limits with respect to any such increase and assuming further that it was an unfair and deceptive trade practice not to have offered members of plaintiffs class the opportunity upon notification of the rental adjustment to "opt-out" of the

lease by express provision or otherwise, without further liability for the remainder of the term, then the members of the plaintiffs class are not entitled to recover judgment pursuant to Chapter 93A unless they meet the requirement of section 9(1) by showing that there was a loss of "money" or "property" as a result of the unfair and deceptive acts or practices. In this case, there was no evidence that the members of the plaintiff class suffered any loss of "money" or "property" as a result of the alleged unfair and deceptive practices. To the extent that members of the plaintiffs class suffered a loss of "money" or "property", it resulted not from the defendants implementation of clause 33 of the lease but from the defendants demand for a rent increase even though pursuant to clause 33 of the

lease and Regulation 11 Section 12 of the defendants were not entitled to a rent increase because the lease provision did not contain an "opt-out" provision. In other words, if the defendants had complied with paragraph 33 of the lease there would have been no demand for a rent adjustment prior to the termination of the leases.

(30) With respect to the Chapter 93A claim arising out of the violation of Regulation 11, Section 12, the Court finds that the plaintiff class is entitled to summary judgment. Section 3.16 of the Attorney General's Chapter 93A Regulations provides as follows:

> Without limiting the scope of any other rule, regulation or statute, an act or practice is a violation of 93A if: (3)-It failes [sic] to comply with existing statutes, rules, regulations or laws, meant for the protection of the public's health, safety or welfare promulgated by the Commonwealth

> or any political subdivision thereof intended to provide the consumers of this Commonwealth protection. . . .

Based on the findings, supra, concerning the violation of Regulation 11 section 12, the Court must also find a violation of section 3.16 of the Attorney General's Regulations with respect to those members of the plaintiff class who actually paid rent in excess of the lawful maximum rent authorized by the Rent Board. Said individuals sustained a loss of "money" within the meaning of G.L. c. 93A §9(1), as said statute was in effect prior to the enactment of Chpater [sic] 406 of the Acts of 1979, irrespective of whether said individuals received refunds of said overcharges pursuant to the preliminary injunction issued by this Court. G.L. c. 93A §9(3) provides for damages "in the amount of actual damages or twenty-five dollars, whichever is greater; or up to

three but not less than two times such amount if the Court finds that the use or employment of the act or practice was a willful or knowing violation of section 2 of Chapter 93A or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated said section two. Chapter 93A §9(4) also authorizes an award of attorney's fees. However, if the Court finds that the defendant made a reasonable tender of settlement in response to a Ch. 93A demand letter, the damages awarded will be limited to the relief tendered. The defendants argue that a reasonable offer of settlement was tendered and that, pursuant to G.L. c.93A §9(3), the plaintiffs recovery should be limited to actual damages. The burden of proving the reasonableness of the

settlement was on the defendants. Kohl v. Silver Lake Motors Inc., 369 Mass. 795, 799 (1976). The offer of settlement of the defendants was as follows:

> Although we deny that we have engaged in "fraudulent or deceptive" practices, it is our desire and intention to correct any incorrectly assessed rent increases. We think it should be understood, however, that if investigation shows that your client has paid less than the amount of rent due we would expect to be paid the amount owed.

This "so called" offer of settlement not only failed to respond to the demand letter's request that rent overcharges be refunded, it even left open the possibility that the defendants would content that the plaintiffs owed the defendants money. In essence, the defendants' offer of settlement was that if a Court found that they were not entitled to the rent increases collected, that they would return the money to the

tenants. By definition, a settlement offer is an offer to do something prior to trial in order to avoid the necessity of having the case go to trial. The defendants' response to the demand letter was hardly the type of communication which would facilitate the settlement of the dispute between the parties. As of the date of the demand letter the defendants had sufficient time to determine their legal position and, under these circumstances, their vague and indefinite response was not a good faith offer of settlement and I find that the defendants have not met their burden of proof. Kohl v. Silverlake Motors, Id., see also Pantry v. Harmony Homes Inc. Mass. App. Ct. Adv. Sh. (1980) 1085, 1090, 1091.

(31) Based on the above findings, I conclude that the defendants' refusal

to grant relief in response to the plaintiffs c. 93A demand letters was made in bad faith with knowledge or reason to know that the practices complained of violated section 2 of chapter 93A and the Court will award each member of the plainiff class who paid any overcharge damages equal to three times the amount of said overcharge. The plaintiff class will also be awarded reasonable attorney's fees.

Accordingly, it is hereby ORDERED that:

(1) At the time final judgment enters in this action, a declaratory judgment shall enter in favor of the plaintiffs declaring that regulation 11, section 12 of the Boston Rent Board prohibitted the defendants from obtaining a rent increase pursuant to paragraph 33

of the lease executed by members of the plaintiffs class.

(2) At the time final judgment enters in this action, judgment shall enter in favor of the plaintiff class with respect to the claim asserted in paragraph 26 of the Second Amended Complaint. Counsel shall file an agreed statement of the damages each member of the class is entitled to pursuant to the Court's findings within fourteen (14) days of receipt of this Order. If no agreement is reached, the parties should notify the Court, and at the hearing on the remaining issues in this case the Court will take evidence as to the entitlement of each member of the class. Based on the admissions on file, it appears that no factual dispute exists and that it is simply a matter of making

mathematical computations based on the Court's findings.

(3) At the time final judgment enters in this action, judgment shall enter in favor of the defendants with respect to all of the Chapter 93A claims as described in paragraph 27 of the Second Amended Complaint as further amended by the Court, except for the claim involving 940 C.M.R. 3.16 and Regulation 11, section 12 with respect to which claim judgment shall enter in favor of the plaintiff class. Counsel shall file an agreed statement of the damages each member of the class is entitled to pursuant to the Court's findings within fourteen (14) days of receipt of this order. If no agreement is reached, the parties should notifiy the Court and at the hearing on the remaining issues in this case the Court will take evidence as

to the entitlement of each member of the class. Based on the admissions on file, it appears that no factual dispute exists and that it is simply a matter of making mathematical computations based on the Court's findings. In addition, within said fourteen (14) days counsel for the plaintiff class shall file an affidavit in support of the requested award of attorney's fees. If counsel for the defendants dispute the reasonableness of the requested award, he shall notify the Court, in writing with a statement of reasons within ten (10) days of receipt of the affidavit in support of an award of fees, and a hearing will also be held on this issue at the time of the hearing on the remaining issues in this case or at such other time as the Court may direct.

(4) Within fourteen (14) days of the date of this Order, counsel shall advise the Court of how much time will be needed for the trial of the remaining issues in this case.

PATRICK J. KING
ASSOCIATE JUSTICE

November 14, 1980

cc:

Russell Fanara, Esquire
BOSTON RENT CONTROL
147 Milk Street
Boston, MA 02109

Mitchel S. Ross, Esquire
BERNKOPF, GOODMAN & BASEMAN
99 High Street
Boston, MA 02109

Harvey Shapiro, Esquire
GREATER BOSTON LEGAL SERVICES
2001 Beacon Street
Brighton, MA 02146

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS: HOUSING COURT DEPARTMENT
BOSTON DIVISION
CIVIL ACTION
NO. 06165

LANA J. SCOFIELD, ET AL, Plaintiff(s)

vs.

BERMAN & SONS, INC., ET AL, Defendant(s)

A M E N D E D J U D G M E N T

This action came on for hearing before the Court, King, J., presiding and the issue having been duly heard and findings having been duly rendered, it is ORDERED and ADJUDGED: 1. The Court hereby enters a declaratory judgment that Boston Rent Board's Regulation 11, §12, prohibited the defendants from obtaining a rent increase pursuant to paragraph 33 of the leases executed by members of the plaintiff class to the extent that members of the plaintiff class were

tenants under a written lease with the defendants on or about November 24, 1976.

2. Judgment shall enter in favor of each member of the plaintiff class against defendants Berman & Sons, Inc., Martin S. Berman and Lila Gross with respect to their claim for violation of Chap. 15 of the Ordinances of the City of Boston of 1975 and Section 12 of Boston Rent Board's Regulation 11 in accordance with the damages set forth in appendix A attached hereto which sets forth the name of each member of the plaintiff class and the damages each such person is entitled to recover. In addition to the damages set forth in appendix A, plaintiff Scofield is awarded attorney's fees in the amount of $6,189 plus costs of $148.34.

3. Judgment shall enter in favor of the defendants with respect to all the claims

of the plaintiff Scofield and the plaintiff class except those which are the subject of the above judgments, including, but not limited to, the claims of plaintiff Scofield pursuant to G.L.ch. 186, §18 and G.L.ch. 93A as described in the above findings.

Dated at Boston, Massachusetts, this 13th day of May, 1982.

_____

CLERK OF COURT

COMMONWEALTH OF MASSACHUSETTS.

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,

At Boston, December , 1984

IN THE CASE NO. SJC-3449

LANA J. SCOFIELD & others

vs.

BERMAN & SONS, INC. & others

pending in the HOUSING COURT OF THE CITY OF BOSTON for the County of Suffolk No. 06165.

ORDERED, that the following entry be made in the docket; viz., --

The case is remanded to the judge of the Housing Court to enter an appropriate order on Scofield's claim under G. L. c. 186, § 18, consistent with the principles expressed in the opinion.

The judgment as to the class claim is affirmed.

By The Court,

_____Clerk.

October 3, 1984

See opinion on file.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

No. SJC-3449

BERMAN & SONS, INC., WILLIAM J. ALLEN, MARTIN S. BERMAN, and LILA GROSS, Appellants	)
v.	)
LANA J. SCOFIELD and A. LARRY BERREN, ON BEHALF OF THEMSELVES AND ALL THOSE SIMILARLY SITUATED, Appellees	)

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Berman & Sons, Inc., William J. Allen, Martin S. Berman, and Lila Gross, the Appellants above-named, hereby appeal to the Supreme Court of the United States from the decision of the Supreme Judicial Court of Massachusetts, affirming the judgment as to the class claim, entered on October 3, 1984.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

For the Appellants:

Mitchel S. Ross, Esquire
James B. Fox, Esquire
BERNKOPF, GOODMAN & BASEMAN
99 High Street, Suite 2050
Boston, MA 02110
Tel: (617) 542-7070

AFFIDAVIT OF SERVICE

I, James B. Fox, attorney in the offices of Bernkopf, Goodman & Baseman, attorneys of record for Appellants Berman & Sons, Inc., William J. Allen, Martin S. Berman, and Lila Gross, depose and say that on the 31st day of October, 1984, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Harvey S. Shapiro, attorney for Appellees herein, by delivering the same to said Harvey S. Shapiro, Esquire, at Greater Boston Legal Services, 68 Essex Street, Boston, Massachusetts 02111 and upon Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, One Ashburton Place, Boston, Massachusetts, inasmuch as 28 U.S.C. §2403(b) may be applicable.

All parties required to be served have been served.

_____

James B. Fox, Esquire

Subscribed and sworn to before me, this 30 day of October, 1984:

_____

Commission Expiration
Date: 3-25-88

MOT

TION

Office-Supreme Court, U.S.
FILED
JAN 18 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-1027

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1984

Berman & Sons, Inc., William J. Allen,
Martin S. Berman, and Lila Gross,

Appellants

v.

Lana J. Scofield and A. Larry Berren,
on behalf of themselves and all
those similarly situated,

Appellees

ON APPEAL FROM THE SUPREME JUDICIAL
COURT OF MASSACHUSETTS

APPELLEES' MOTION TO DISMISS

Harvey S. Shapiro, Esq.
Greater Boston Legal Services
68 Essex Street
Boston, Mass. 02111
Tel: (617) 357-5757

NO. 84-1027

IN THE SUPREME COURT OF THE UNITED STATES

December Term, 1984

Berman & Sons, Inc., William J. Allen, Martin S. Berman, and Lila Gross,

Appellants

v.

Lana J. Scofield and A. Larry Berren, on behalf of themselves and all those similarly situated,

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ON APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

APPELLEES' MOTION TO DISMISS

Harvey S. Shapiro, Esq.
Greater Boston Legal Services
68 Essex Street
Boston, Mass. 02111
Tel: (617) 357-5757

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Statement of The Case

The Appellees adopt the statement of the case contained in the Appellants' "Jurisdictional Statement."

Summary of the Argument

The judgment of the Supreme Judicial Court of Massachusetts rests on an adequate non-federal basis, namely, a construction by the state court of the parties' lease agreement. Accordingly, the judgment of the Massachusetts Supreme Judicial Court does not implicate Art. 1, §10, cl 1 of the United States Constitution.

Even if the Massachusetts Supreme Judicial Court's decision did not rest on an adequate non-federal ground, the appeal here would not present a

substantial federal question. The Appellants have failed to cite in their jurisdictional statement a single matter decided by this Court, or any federal court, arguably supportive of their contentions under the Contract Clause. The Appellants have similarly failed to distinguish in any way the analysis contained in other relevant cases which, if a bona fide Contract Clause case were presented, would fully support the position of the Appellees that any such impairment of contract as occurred, was temporary, not financially irrevocable, not completely unexpected, and reasonable in relation to the objective sought to

be accomplished, and was therefore permissable under the Contract Clause.

Argument

I. The Judgment Subject Of Appeal Rests On An Adequate Non-federal Basis.

The threshhold problem that the Appellants ("landlord") face in contending that this Court has jurisdiction under 28 U.S.C. §1257(2) is that the decision of the Massachusetts Supreme Judicial Court from which the appeal is taken rests on that court's construction of a lease agreement betwen the parties and not on an application of the Contract Clause of the U.S. Constitution.

The landlord argues that the Boston Rent Board Regulation which

provided that landlords were not authorized to collect a rent increase until existing leases had expired unless the tenants were, under the terms of their leases, given the option of terminating their tenancies instead, impaired his rights under Article I, §10, cl.1 of the U.S. Constitution. The trial court, however, looked to the landlord's own lease, not the Constitution, as the basis for denying him the right to collect the rent increase at issue:

> [A]n examination of clause 33 of the lease demonstrates that the lease specifically provides that the landlord is not entitled to a rent increase during the term of the lease unless the Rent Board authorizes such a rent increase. ... Since Berman & Sons in drafting its' lease

> agreed that said defendant would not be entitled to a rent increase unless authorized by the Rent Board, the Court fails to see how the defendants can now argue that they are being deprived of their rights under the terms of the contract simply because the Rent Board never authorized the the defendants to increase the rent of the members of the plaintiff class during the term of their leases.[1]

[A.55-56]. The decision of the Massachusetts Supreme Judicial Court was similarly premised:

> By the terms of the defendants' lease agreement the lessor was not entitled to a rent increase unless "authorized or permitted" to adjust the rent under the

---

[1]The trial court also found that "even if there were some basis for finding that the defendants have been deprived of some right under the terms of the lease," there would still have been no unconstitutional impairment. [A.56-57]

> "rent control laws ... regulating rents ... [in] the demised premises." This provision clearly provides that any adjustment would be subject to the Rent Board's approval. It is anomalous for the defendant now to argue that Regulation 11 deprived them of rights under their lease agreement.

[A.7-8] The state's highest court found no inconsistency between the lease clause and the Rent Board regulation.[2] [A.8 n10] That court thus found it unnecessary to address the issue of whether the lease here could have been forced to yield to a

---

[2]Had the state court found the lease ambiguous, it still would have been required to construe it against the drafter, the lessor. See Massachusetts Turnpike Authority v. Perini Corp., 349 Mass. 448, 208 N.E. 2d 807 (1965).

conflicting legislative enactment without violating the landlord's rights under the Contract Clause of the Constitution.

The landlord recognizes that the state court found it unnecessary to address the constitutional issue. That court, the landlord alleges, "simply avoided the issue" which he sought to present. Jurisdictional Statement, at 13-14, 10. The landlord may be unhappy with the state court's construction of the applicable provision of his lease, but that does not bring him any closer to presenting a substantial constitutional issue for this Court to review.

In the foregoing context, the

landlord's inability to collect the rent increase during the lease term resulted not from some species of "retroactive nullification", but rather from the landlord's failure to have included in his lease a clause which would have allowed a tenant to terminate the lease rather than pay the increased rent. Without such a provision tenants might have been "locked into" leases at rentals which they were not prepared to pay, or which they simply could not afford, at substantial risk of default and considerable liability as a result thereof.[3] To suggest, on the

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[3]The landlord's lease provided that
(cont. on next page)

other hand, that the tenants agreed to be bound in such a manner, Jurisdictional Statement, at 14, is not only at odds with the construction of the contract placed upon it by the state's highest court; the very circumstances which have traditionally prompted the imposition of rent controls speak to a lack of bargaining power in the market place, such that reliance on what a tenant may or may not have "agreed to"

(ftnt 3 cont.) in the event of a tenant's default, the tenant would, at the lessor's option, be liable "forthwith" for the sum by which the rent for the remainder of the term exceeded the fair rental value for that term, be liable to indemnify the landlord for any loss of rent, a broker's commission for reletting, advertising costs, costs of cleaning and repainting, and attorneys fees. Lease, ¶23(A)(B).

in a lease contract is, with respect to the rental term especially, highly suspect, if not entirely beside the point.

That the clause which the landlord failed to include in his lease had been required earlier as a condition to a landlord's being able to collect a rent increase before the expiration of an existing lease, and was not newly contrived by the Boston Rent Board at the time of the rent increase here at issue, is made plain by the decision in McGrath v. Mishara, 386 Mass. 74, 434 N.E.2d 1215, 1217 (1982). In that case the Massachusetts Supreme Judicial Court relied on a similar requirement in

connection with a rent increase by the Boston Rent Board dating back to March, 1975, id., at 1217--over a year and a half prior to the circumstances which gave rise to this case. The landlord can thus hardly contend that he was unfairly surprised by the Rent Board's conditioning the immediate collection of the rent increase here, on the inclusion in his lease of a provision which the Board had previously insisted on in similar circumstances. Indeed, there was evidence before the state court that the industry generally was aware of, or at least fully anticipated, the obligation to give tenants the opportunity to terminate their leases

in lieu of being required to pay a higher rent during the term of an existing lease. Thus the "Standard Form Apartment Lease" of the Rental Housing Association of the Greater Boston Real Estate Board had, since at least 1974, accorded tenants such protection. See Preamble, paragraph D to such Standard Form Apartment Lease as set forth in Exhibit A appended hereto.

II. The Appeal Does Not Present A Substantial Federal Question.

Were it determined that the contract clause was implicated by the Rent Board regulation, the tenants would submit that there was no substantial impairment, that the

preconditions imposed by the Board to immediate implementation of the rent adjustment were not completely unexpected, and that the alteration of the contractual relationships, if any, were temporary, and not financially irrevocable. Allied Structural Steel Co. v. Warren Spannaus, 438 U.S. 234, 57 L.Ed.2d 727, 736-740, 98 S.Ct. 2716 (1978).

The landlord does not assert a claim of confiscation, nor does he argue that the existing rents were unreasonably low. Cf. American Manufacturers Mutual Insurance Company v. Commissioner of Insurance, 374 Mass. 181, 372 N.E.2d 520 (1978). The impairment was thus not substantial in

the foregoing sense.

The landord was clearly engaged in a regulated activity. The thrust of that regulation pertained to the adjustment of rents. The landlord was aware of that regulatory activity and expressly conditioned his own rights under the lease accordingly. While this landlord failed to anticipate that specific contractual language would be required to implement rent increases during the term of the lease, similar requirements had previously been imposed, and others in the industry had incorporated such provisions in their leases. Cf. Energy Reserves Group, Inc. v. Kansas Power and Light Co., 459 U.S. 400, 74

L.Ed.2d 569, 103 S. Ct. 697, 707-708 (1983)("[T]he contracts expressly recognize the existence of extensive regulation by providing that any contractual terms are subject to relevant present and future state and federal law. This latter provision could be interpreted to incorporate all future state price regulation, and thus dispose of the Contract Clause claim. Regardless of whether this interpretation is correct, the provision does suggest that ERG knew its contractual rights were subject to alteration by state price regulation.")

Finally, the particular regulation under attack merely deferred the effective date of the rent increase

where tenants were not given the right "opt out" of the lease until the expiration date of that lease. The Rent Board could have simply provided that that would be the effective date in all cases, without allowing for increases during the lease term in any circumstances. The landlord does not suggest otherwise. Indeed, if for some reason the Rent Board's precondition for immediate implementation of the rent adjustment had imposed a hardship on a particular landlord, under Section 11(c) of the regulation a further adjustment could have been sought.[4]

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[4]Section 11(c) the Boston Rent Board
(cont. on next page)

Conclusion

The landlord's appeal should be dismissed as presenting no federal question. The state court judgment was premised on a construction of the lease contract - not on some supposed conflict between the regulation and

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(ftnt 4 cont.) regulation at issue provides:

C. HARDSHIPS:

1. For the purpose of alleviating hardships and other inequities, any rents adjusted by this Regulation may be further adjusted by the Board according to the provisions of the Ordinance, and the Boston Rent Regulations.

2. Any landlord who claims that his maximum rents do not yield a fair net operating income may file an individual Landlord Petition for Adjustment on or after March 1, 1977.

the lease, such that the former might be said to have impaired the latter. The landlord was aware of this but nevertheless he fails to explain why this fact is not determinative of his appeal.

Even if a claim under the Contract Clause were presented, it could not be characterized as "substantial". The landlord has not even attempted to apply case law to the facts of his case in order to demonstrate some measure of substantiality. Not a single case of this Court is cited in argument. The landlord has not provided any reasons "why the questions presented are so substantial as to require plenary

consideration." Sp. Ct. Rule 15.1(h).

The Appellees respectfully request that the Court dismiss the landlord's appeal.

Lana Scofield, et al.
By her attorney,

Harvey S. Shapiro, Esq.
Greater Boston Legal Services
68 Essex Street
Boston, MA 02111
(617) 357-5757

January 14, 1985

APPENDIX A

Standard Form Apartment Lease
[Preamble]

. . .

RENT

D: If at any time after the date hereof the leased premises are or become subject to rent control laws or other laws regulating rents, and if the Lessor is, in accordance with such laws, at any time authorized or permitted to increase the rent for the leased premises, and if at any time thereafter the Lessor gives written notice of his intention to implement such increase in whole or in part, then, in such event and not otherwise, the Lessee may terminate this lease by giving notice of his intention within thirty days after the lessor's notice of implementation. If the Lessee gives such notice within thirty days, this lease shall terminate on the last day of the monthly rental period next after the date of such notice. If the Lessee does not give

such notice within thirty days, then the rent shall be increased in accordance with the Lessor's notice of implementation commencing with the rent payment immediately following the expiration of said thirty day period, but in no event shall the rent exceed $____ per month during the term hereof.